

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

DIANE BUTTON v. MITCHELL WAITE

Appeal from the Chancery Court for Williamson County
No. 31256 Russ Heldman, Judge

No. M2005-01553-COA-R10-CV - Filed July 15, 2005

This extraordinary appeal involves the efforts of a mother to circumvent the orders of a trial court in Hawaii regarding psychological counseling for her child. After moving to Tennessee, the mother declined to accept the Hawaii court's selection of a therapist for the child and filed a petition in the Chancery Court for Williamson County for the purpose of frustrating the Hawaii court's order. The trial court, exercising its temporary emergency jurisdiction pursuant to Tenn. Code Ann. § 36-6-219 (2001), countermanded the Hawaii court's order. The child's father then filed this extraordinary appeal pursuant to Tenn. R. App. P. 10. We have determined that the trial court's exercise of emergency jurisdiction so far departs from the accepted and usual course of judicial proceedings as to require immediate review pursuant to Tenn. R. App. P. 10. Because the Hawaii court's selection of the child's therapist does not constitute "an emergency" as contemplated by Tenn. Code Ann. § 36-6-219, we vacate the trial court's order and remand the case with instructions to enter an order dismissing the case for lack of jurisdiction.¹

Tenn. R. App. P. 10 Extraordinary Appeal; Judgment of the Chancery Court Vacated

WILLIAM C. KOCH, JR., P.J., M.S., WILLIAM B. CAIN and FRANK G. CLEMENT, JR., JJ., delivered the opinion of the court.

Lorie S. Nachlis, San Francisco, California and Marlene Eskind Moses, Nashville, Tennessee, for the appellant, Mitchell Waite.

Philip Edward Schell, Franklin, Tennessee, for the appellee, Diane Button.

Joanie Lucie Abernathy, Franklin, Tennessee, Guardian Ad Litem.

¹The Tenn. R. App. P. 10 application and the answers fully set forth the parties' positions and the material facts. Therefore, pursuant to Tenn. R. App. P. 2, we suspend the application of Tenn. R. App. P. 29, and find oral argument to be unnecessary pursuant to Tenn. R. App. P. 35(c). See *Hammock v. Sumner Co.*, No. 01A01-9710-CV-00600, 1997 WL 749461 (Tenn. Ct. App. Dec. 5, 1997) (No Tenn. R. App. P. 11 application filed).

MEMORANDUM OPINION²

I.

The child in this case was born out of wedlock in Marin County, California on October 18, 1996. Prior to the child's birth, a trial court in Marin County entered a stipulation and judgment awarding the parents joint legal custody of the child and designating the mother as the primary physical custodian. The mother later moved to Hawaii with the child. On December 11, 2001, the mother sought a temporary restraining order against the father in Hawaii asserting that the father had sexually abused the child. When the father sought to have the California court exercise jurisdiction over the matter, the California court determined that Hawaii was the more appropriate forum to decide the matter and stayed the proceedings in California. In March 2002, the Hawaii court entered an order of protection prohibiting the father from having any contact with the child.

The Hawaii court conducted a trial in November 2002 concerning the abuse allegations. On April 7, 2003, it entered an order finding, by a preponderance of the evidence, that the father had sexually abused the child by inappropriate touching. The Hawaii court also appointed Dr. Craig Robinson, a clinical psychologist, as the child's guardian ad litem. Over the following year the parties filed various motions in Hawaii related to custody and reunification with the father.

In March 2004, after learning that the mother intended to move to Tennessee, the father filed a petition in the Hawaii court to prevent her from moving. The Hawaii court allowed the mother to move to Tennessee but specifically stated that it would retain jurisdiction over the matter. On May 7, 2004, because the parties could not agree on a therapist for the child, the Hawaii court directed Dr. Robinson to select a therapist for the child in Tennessee. Despite the Hawaii court's order, the mother began taking the child to Dr. Chiarina Owens, a therapist of the mother's own choosing. The mother's conduct alarmed Dr. Robinson because he and his colleagues became concerned about Dr. Owens's diagnosis and treatment. Accordingly, Dr. Robinson traveled to Tennessee to assess the situation. He also interviewed several local therapists and eventually recommended that the Hawaii court select Gretchen Watts as the child's therapist. The Hawaii court accepted the recommendation and appointed Ms. Watts as the child's therapist. The Hawaii court also ordered Dr. Owens to discontinue treating the child. However, the mother ignored the Hawaii court's order, and the child continued to be treated by Dr. Owens. Ms. Watts has seen the child only once.

In January 2005, the mother filed a petition in the Chancery Court for Williamson County to register the Hawaii decree and to transfer jurisdiction from the Hawaii court to Tennessee. On

²Tenn. Ct. App. R. 10 provides:

The Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion, it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

March 30, 2005, the Hawaii court contacted the trial court in Williamson County concerning the issue of jurisdiction. Following this conversation, the Hawaii court wrote a letter confirming its determination that Hawaii has continuing jurisdiction until such time as California demands the case be returned to California and that changing jurisdiction to Tennessee would not be in the child's best interests.

On April 26, 2005, the trial court in Williamson County, sua sponte, appointed another guardian ad litem for the child. The mother then filed an ex parte motion asking the trial court to assume temporary emergency jurisdiction. On April 29, 2005, the trial court entered an order exercising emergency temporary jurisdiction pending a full hearing and allowing the mother to continue taking the child to Dr. Owens rather than to Ms. Watts pending the hearing. The hearing was held on May 10, 2005. On May 12, 2005, the trial court decided to continue exercising "temporary emergency jurisdiction for all purposes in this case until the order requiring termination of Dr. Owens's services is vacated or the Hawaiian court voluntarily relinquishes jurisdiction to Tennessee."

II.

Tenn. Code Ann. §§ 36-6-201 to -243 (2001), Tennessee's version of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), governs jurisdictional conflicts between Tennessee and other states over child custody proceedings. A child custody proceeding includes a proceeding involving visitation. Tenn. Code Ann. § 36-6-205(4).

When a child custody proceeding has already been commenced in a court of another state having jurisdiction, a court in this state may not exercise jurisdiction over the matter unless the prior proceeding has been terminated or stayed by the court of the other state because of this state being a more convenient forum.³ Tenn. Code Ann. § 36-6-221(a). If the court of the other state does not decide that this state is a more convenient forum, the court of this state "shall dismiss the proceeding." Tenn. Code Ann. § 36-6-221(b). The only exception lies in the temporary emergency jurisdiction provisions of Tenn. Code Ann. § 36-6-219.

When the mother filed her petition in the trial court, a child custody proceeding was already pending in Hawaii. The Hawaii court has neither stayed nor terminated the proceeding before it. To the contrary, after consulting with the trial court, the Hawaii court specifically declined to cede jurisdiction to Tennessee. The decision to terminate or stay the Hawaii proceedings because Tennessee is a more convenient forum rests solely with the Hawaii court, and neither the trial court nor this court can review the Hawaii court's decision.⁴ Accordingly, this case must be dismissed

³ Jurisdiction attaches at the commencement of a proceeding. Jurisdiction is not lost by all parties moving out of the state prior to the conclusion of the proceedings. Tenn. Code Ann. § 36-6-217 (Advisory Commission Comments).

⁴ If the mother is dissatisfied with the Hawaii court's decision, her remedy lies with Hawaii's appellate courts.

unless the Williamson County court has temporary emergency jurisdiction under Tenn. Code Ann. § 36-6-219.

Tenn. Code Ann. § 36-6-219(a) provides:

A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.

It requires an allegation of an emergency in which the child, a sibling or parent, is subjected to or threatened with mistreatment or abuse. *P.E.K. v. J.M.*, 52 S.W.3d 653 (Tenn. Ct. App. 2001).

The selection of an alternate therapist by a court-appointed guardian ad litem is not the type of emergency contemplated by the statute. Moreover, Tenn. Code Ann. § 36-6-219 contemplates the exercise of emergency jurisdiction only on a temporary basis until a court with proper jurisdiction under Tenn. Code Ann. §§ 36-6-216, -217, or -218 is able to act. Tenn. Code Ann. § 36-6-219 does not contemplate a court of this state exercising emergency jurisdiction to countermand an order entered by a court of another state merely because the court of this state would have reached a different conclusion. To permit a court in this state, under the guise of temporary emergency jurisdiction, to substitute its judgment for that of a court of another state which has fully considered the matter would undermine the basic goals of the UCCJEA set forth in Tenn. Code Ann. § 30-6-202.

III.

The trial court's order exercising Temporary Emergency Jurisdiction pursuant to Tenn. Code Ann. § 36-6-219 is hereby vacated and the case is remanded to the trial court with instructions to enter an order dismissing the case for lack of jurisdiction. The costs of this appeal are taxed to the mother for which execution, if necessary, may issue.

PER CURIAM